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No. 533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

TORAO TAKAHASHI, *Petitioner*,

v.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

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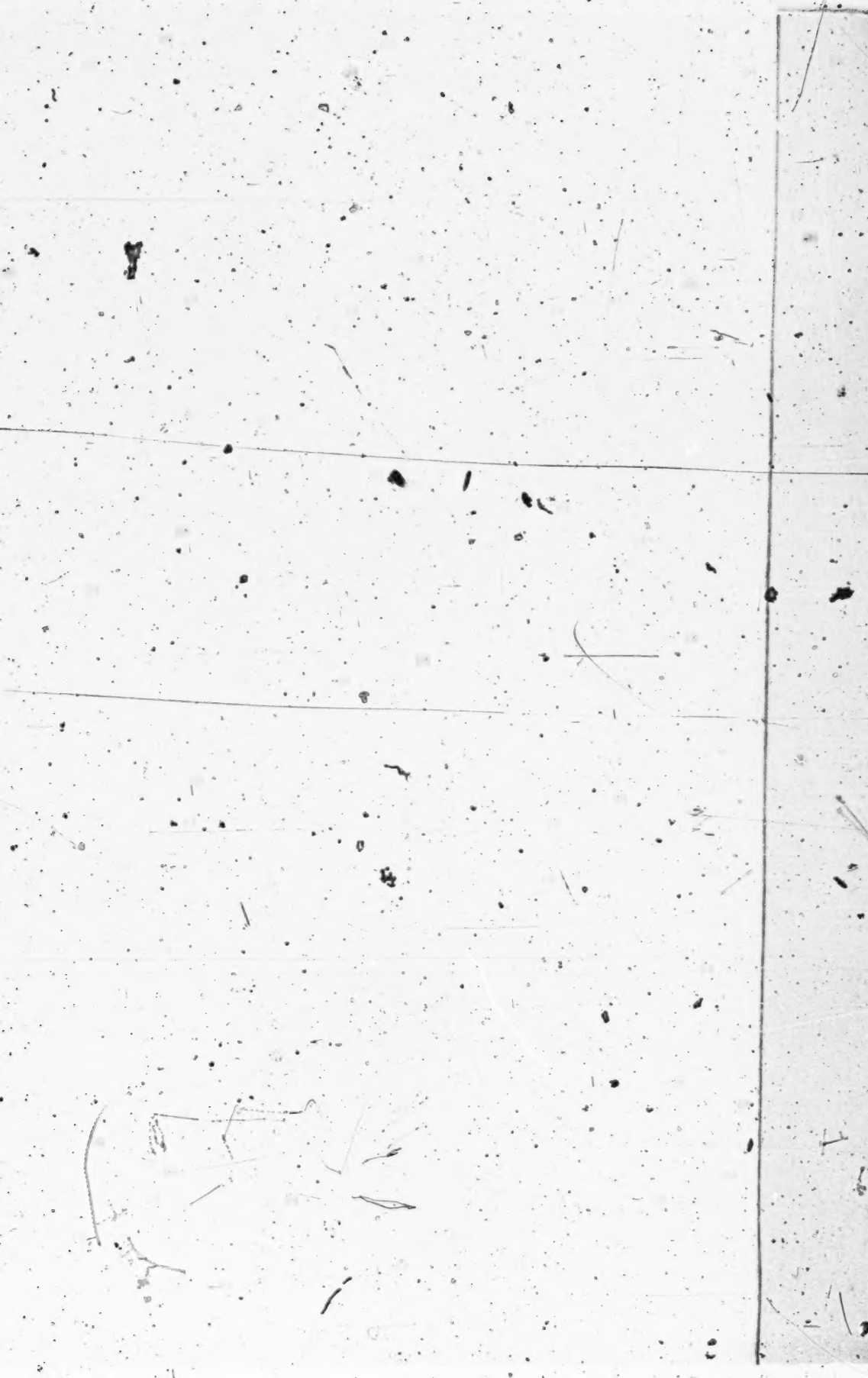

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered on October 17, 1947 (R. 54), reversing the original and amended judgments of the Superior Court of California for the County of Los Angeles (R. 6, 7, 21), and directing that judgment be entered for the respondents (R. 54).

OPINIONS BELOW.

The memorandum of opinion in the Superior Court (R. 11-18) is not reported. The opinions in the Supreme Court of California (Opinion, R. 30; Dissenting Opinion, R. 45) are reported in 30 Advance California Reports 723, 185 Pac. (2d) 805.

JURISDICTION.

The judgment of the Supreme Court of California was entered October 17, 1947 (R. 54). It ordered that the judgments of the Superior Court "be and the same are hereby reversed with directions to enter judgment for the commission and its members." (*Ibid*). The constitutional issues here presented were urged in the trial court (R. 2, 11-18) where they were sustained (R. 6, 7, 21) and in the court below (R. 30-53) where they were overruled (R. 54). The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

Section 990 of the Fish and Game Code of California prohibits the issuance of commercial fishing licenses to aliens ineligible to citizenship. Petitioner is a Japanese alien, denied a license because of the statute. The questions presented are:

1. Whether Section 990 does not, on its face deprive petitioner, an alien of the Japanese race, of the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution.

2. Whether Section 990 is not, in its purpose and effect, a racist statute, directed solely against Japanese aliens, and thus a denial to petitioner of the equal protection of the laws and of due process of law.

3. Whether Section 990 is not invalid because of conflict with Federal authority over, and federal policy with respect to, fisheries on the high seas and on coastal waters.

STATUTE INVOLVED.

The statutory provision involved is Section 990 of the Fish and Game Code of California, as amended, (Stats. 1945, Ch. 181) which reads as follows:

> "990. Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state shall procure a commercial fishing license.
>
> "A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship."

STATEMENT.

On June 7, 1946, Torao Takahashi filed an amended petition for a writ of mandamus in the Superior Court of the State of California for Los Angeles County (R. 1, 6). The respondents were, and are in this Court, the California Fish and Game Commission and the chairman and members thereof (R. 2). The allegations of the amended petition may be summarized as follows:

Takahashi was born in Japan, but was a resident of Los Angeles, California from 1907 until 1942, when he

was evacuated by military order from California along with others of Japanese ancestry. Between 1915 and the time of his evacuation he was engaged in the occupation of commercial fishing on the high seas. During that period he received annually, upon application, a commercial fishing license from the respondent Fish and Game Commission (R. 1, 6).

In October, 1945, upon the termination of the military exclusion orders, Takahashi returned to California to resume his former occupation. He is in all respects qualified to obtain a commercial fishing license except that he is of Japanese ancestry. Respondents have refused to issue him such a license because of the provisions of Section 990 of the Fish and Game Code, *supra*, and because he is of Japanese ancestry. Takahashi has no other occupation except that of commercial fishing, and since his return to California he has been unable to secure other employment.[1]

Respondents filed both an answer and a general demurrer (R. 3-4). The demurrer was overruled and the trial court, finding the only issue to be one of law (R. 12), ordered the peremptory writ of mandate to issue, thus directing the Commission to issue petitioner a commercial fishing license authorizing him to bring ashore in California fish caught by him in the high seas for fresh sale (R. 7). Subsequently, the judgment was amended so as to require respondents to issue a general

[1] Allegations that Takahashi's two sons and two sons-in-law had served in the United States Army, three of them overseas, and that one had received a Purple Heart and an Oak Leaf Cluster for service in the Air Corps overseas (R. 1-2), were struck by the Superior Court (R. 6) at the motion of respondents (R. 4-5). Struck, also, was the allegation that Takahashi had arrived in the United States legally and was a lawful resident of Los Angeles (R. 1, 4-5, 6).

commercial fishing license without limitation (R. 21).

The decisions below. The Superior Court based its judgment for petitioner on two distinct grounds. First, it held that to deny a resident of a State, solely because he is an ineligible alien, a commercial fishing license is to deny the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This denial, the court said, could not be justified as the regulation by the State of the disposition of its own property, but was rather an unlawful limitation of the right to pursue a private and lawful occupation (R. 16). Second, it held that the legislative history of this California statute makes clear that its language is but a "thin veil used to conceal" a "purpose * * * too transparent" to eliminate Japanese aliens from the right to a commercial fishing license (R. 16-17). Such discrimination, "patently hostile", it found to be without any reasonable basis (R. 17-18).

The Supreme Court of California, three of the seven justices dissenting, reversed the Superior Court. The majority was of the view that the legislature has almost unlimited powers to regulate hunting and fishing within its own borders and to deny the right to engage in these activities to other than its own citizens as it sees fit (R. 36-38). Moreover, relying on the decision of this Court in *Terrace* v. *Thompson*, 263 U. S. 197, and on its own decision in *People* v. *Oyama*, 173 Pac. (2d) 794, (now pending for decision in this court, October Term 1947, No. 44), which concerned prohibitions against ownership of land by classes of aliens, the court took the position that the ineligible alien classification is a reasonable one for conservation purposes (R. 38). The majority of the court did not feel that it had been established that the statute was racial in intent or ap-

plication (R. 39-42). Finally, the court held that, to the extent that the statute applies to the bringing ashore of fish caught beyond the coastal waters, it is reasonably calculated to render effective the State's power of control over the fish supply within its territorial waters (R. 42-45).

The dissenting opinion of Justice Carter (with whom Chief Justice Gibson and Justice Traynor concurred) saw the issue primarily as whether an ineligible alien resident "may be excluded from engaging in a gainful occupation—from working—making a living" (R. 45). Under *Truax* v. *Raich*, 239 U. S. 33, and *Yick Wo* v. *Hopkins*, 118 U. S. 356, they believed that there could be but one answer. They could find no reasonable basis for denying resident aliens the right to make a livelihood from commercial fishing and no conceivable basis for discriminating between classes of aliens (R. 46-50). "Assuming the soundness of * * * the alien land law cases" (R. 53), the minority distinguished them from the instant case as being related to the devolution of real property and not to earning a living in a common occupation (R. 52-53). Finally, "highly persuasive arguments" may be made that the legislation in question is actually aimed solely against Japanese and is hence invalid as racist in purpose (R. 53).

On October 17, 1947, the Supreme Court entered its judgment, that the judgments of the Superior Court "be and the same are hereby reversed with directions to enter judgment for the commission and its members" (R. 54).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of California erred:

1. In failing and refusing to hold that Section 990 of the Fish and Game Code of California did not, on its face, constitute a denial to petitioner, an alien of the Japanese race, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution.

2. In failing and refusing to hold that Section 990 is not, in its purpose and in its necessary effect, a racist statute directed against aliens of Japanese origin, and thus a denial to them, including petitioner, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment.

3. In failing and refusing to hold that Section 990 is not invalid because of conflict with Federal authority over, and federal policy with respect to, fisheries on the high seas and on coastal waters.

4. In reversing the decision of the Superior Court.

REASONS FOR GRANTING THE WRIT.

I.

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA, ON ITS FACE, DEPRIVES TORAO TAKAHASHI, AN ALIEN INELIGIBLE TO CITIZENSHIP, OF THE EQUAL PROTECTION OF THE LAWS AND OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 990 of the Fish and Game Code of California, as amended, *supra*, requires a commercial fishing license not only by those who fish in the waters of California but also by those who fish anywhere and who bring

their catch ashore at any point on the coast of California for sale. Torao Takahashi, born in Japan, but a resident of California for almost forty years, earned his living from 1915 to 1942 by fishing on the high seas. During all that 27 years he was issued commercial fishing licenses. Since Takahashi's return to California from military evacuation, he has been unable to resume his former occupation because of the 1945 amendment to the Fish and Game Code (Section 990, *supra*). This amendment, on its face, is contrary to the Fourteenth Amendment of the Constitution of the United States. It is even more clearly in conflict with the provisions of Section 41 of Title 8, U. S. C.; *Virginia* v. *Rives*, 100 U. S. 313, 317. We believe that it must certainly be stricken down.

This statute expressly discriminates against aliens. But it does more than that: it divides the alien population into two groups, and denies commercial fishing privileges to a minority within a minority—the aliens ineligible to citizenship. But ignoring for a moment the double discrimination, the issue, as the minority below stated it (R. 45):

> "is whether an alien resident may be excluded from engaging in a gainful occupation—from work—making a living."

On that issue the prior decisions of this Court leave no doubt as to the answer. Thirty years ago, in *Truax* v. *Raich*, 239 U. S. 33, it said (at p. 41):

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers'*

Union Co. v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins; supra; Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words."

It is no answer to say, as the State and the majority of the court below argue, that fish are the property of the State; that in the interest of conservation it may limit the right to fish; and that the reduction in the number of persons who may fish has a reasonable relationship to the object of conservation of fish and hence is within the police power of the State (R. 32, 36-43). The question remains whether the State may single out aliens from bringing into California for sale fish caught on the high seas outside its own territories. The question, however, answers itself; such a restriction patently amounts to an unreasonable classification inconsistent with the equal protection of the laws, and a deprivation of the due process of law required by the Fourteenth Amendment. *Truax* v. *Raich, supra; Truax* v. *Corrigan*, 257 U. S. 312. Certainly, under that Amendment, a power to control does not mean the power to control arbitrarily. No one would say that the State could preserve its resources by denying licenses to fish only to red-heads.

The classification established by the State discriminates not only against aliens, however, arbitrary as that would be. Here, as already pointed out, the discrimination is against a very special limited class of aliens—those ineligible for citizenship. The large numbers of non-resident aliens may carry on the occupation

denied Takahashi. German, British, and Russian aliens domiciled anywhere in this country, in or out of California, or for that matter, in or out of the United States, may make their living fishing on the high seas and selling their catches in California. Only ineligible aliens—resident or non-resident of California—are denied this privilege. Such a discrimination is baseless on its face, and the suggestion that it can be supported on the theory that the State can reduce the number of fishermen for conservation purposes, and that "it is logical and fair that aliens ineligible for citizenship shall be the first group to be denied the privilege" (R. 38) does no more than confirm its patent unconstitutionality. Takahashi is a resident of the State of California. If participation in the bounty of the State may be limited, a resident of California, with obligation to the State, has far more right to participate in it than a German alien who is a resident of another State or even of Germany.

Nor may the State obtain support from *Terrace* v. *Thompson,* 263 U. S. 197, upon which the majority below relied (R. 38). This court has been asked to reconsider, limit, and—if necessary—reverse the *Thompson* case in *Oyama* v. *California,* October Term 1947, No. 44, now pending before the Court for decision. In any event, it held at most that eligibility for citizenship is a reasonable classification for purposes of restricting the devolution of real property. There Mr. Justice Butler took pains to distinguish *Truax* v. *Raich, supra,* pointing out that in *Truax* v. *Raich* the legislation (p. 221)

> "did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering

> the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure."

As the minority of the court below said (R. 53):

> "Assuming the soundness of that distinction and the alien land law cases here we have a common occupation or calling 'commercial fishing,' and hence the Truax case controls. 'Fishing was one of man's earliest source of food supplies and it is still one of his most important means of livelihood.'"

Finally, it should be noted that the court below conceded that the State's power to regulate the bringing ashore to California for sale fish caught on the high seas is not a direct or express power but rather a "necessary" one to make effective its power to control its own fisheries (R. 42-45). California clearly may exercise no power over fishing on the high seas; indeed, as indicated below in Point III, the extent of its power over fishing on the coastal waters is far from clear. Thus, no matter what may be the scope of its authority with respect to its inland waters (which are not here involved), there is even less basis, if that be possible, for any presumption as to the validity of the State's classification for licensing fishermen to fish in an area which is not a part of its public domain.

II.

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA IS ANTI-JAPANESE AND RACIAL IN PURPOSE AND HENCE DEPRIVES TORAO TAKAHASHI, AN ALIEN OF JAPANESE RACE, OF THE EQUAL PROTECTION OF THE LAWS AND OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The minority of the court below, although finding the statute to be unconstitutional on its face, added, in addition (R. 53):

> "Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a particular race, in spite of the fact that that race is not mentioned by name in the statute."

The Superior Court made this an express ground of decision, stating (R. 17) that the words "aliens ineligible to citizenship" were no more than a

> "thin veil used to conceal a purpose being too transparent * * * to eliminate alien Japanese from those entitled to a commercial fishing license by means of a description rather than by name."

A brief reference to the legislative history of the statute, and some of the facts with respect to aliens in California, will demonstrate the accuracy of the conclusion of the Superior Court.

Section 990 of the California Fish and Game Code was first codified in 1933 (Stats. 1933, ch. 73; based on Stats. 1909, ch. 197, as amended). In 1943 the statute was amended to provide, in so many words, that alien Japanese alone could not receive commercial fishing licenses. It then read (Stats. 1943, ch. 1100):

> "A commercial fishing license may be issued to any person other than an alien Japanese."

In 1945 this statute was considered further by a committee of the California Senate. *Report of the Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945.* That Committee reported as follows on the subject of "Japanese Fishing Boats" (pp. 5-6):

> "The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."

A few months later, Section 990 was revised to read the way it reads today, with the phrase "any person other than a person ineligible to citizenship" substituted for the phrase "any person other than an alien Japanese"—precisely as recommended by the Senate Committee.

No one can reasonably doubt that the Senate Committee was concerned only with the Japanese, and how the "menace" of the Japanese fishing boats might be eliminated; the whole Report was on the Japanese "problem".[2] Nor can one reasonably doubt that the same concern motivated the California legislation. The

[2] A copy of the Report of May 1, 1945, has been lodged with the Clerk in connection with Oyama v. California, October Term, 1947, No. 44.

phrase "aliens ineligible for citizenship" has in fact become, in California at least, merely a synonym for "Japanese", and a convenient circumlocution by which to evade constitutional limitations. In the past, a number of groups of aliens were ineligible to United States citizenship; now, changes in the naturalization laws have left the restriction applicable—for practical purposes in California—to but one racial group.

Census figures, and other statistics subject to judicial notice, indicate the practical situation. In 1940, apart from the Japanese, the total of *citizens and aliens* in California of racist groups not eligible for citizenship was 2,962. *Census of 1940, Characteristics of the Population,* Part I, Table 22. The census gives no figures for aliens and citizens separately, in this group. In the same year, *citizens and aliens* of Japanese origin or descent were 93,717, of whom but 33,509 were aliens. H. Rep. No. 2124, 77th Cong., 2d Sess. (1942) pp. 91, 96. If the same ratio of citizens to aliens applies to the ineligible aliens other than Japanese, as it probably does, there are no more than 1000 people other than Japanese aliens out of California's 6,907,387 who suffer when the California legislators decide that a "better" definition of "Japanese"—at least a more sophisticated one—is "aliens ineligible to citizenship." In the whole United States, 98 per cent of the ineligible aliens were Japanese.

Moreover, so far as commercial fishing is concerned, it is not clear that *anyone* other than Japanese aliens suffers when the more sophisticated definition is used. In 1935—a prewar year—the Bureau of Commercial Fisheries of California, in its annual report (Fish Bulletin No. 49) classified the 6007 licensees by nativity. Apart from Japanese, no other racial group ineligible to citizenship appears in the table (p. 143). Possibly

there are some in the "scattered representatives of other nations, totaling 89 fishermen", but equally possible, there are not. At most there could be but 89.

Patently, therefore, the legislation is anti-Japanese both in purpose and in effect. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. As such, it is instantly suspect. *Korematsu* v. *United States*, 323 U. S. 214, 216. It meets neither the rigorous standards of property to which legislation of this type must conform, *Thomas* v. *Collins*, 323 U. S. 516, 527, 532, nor the normal standards of reasonableness of statutory classification, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Buchanan* v. *Warley*, 245 U. S. 60. Any alleged conservation purpose becomes even more baseless when the statute is considered in its true racial light. In 1940 California's alien Japanese population numbered 33,059 out of a total population of 6,907,387. In 1941-1942, the last year when Japanese aliens could receive commercial fishing licenses from California, only 7 per cent of the alien fishermen were alien Japanese, a figure that had been constantly decreasing throughout the years. See Fish Bulletin No. 59, p. 21. Compare, for prior years, Fish Bulletin No. 57, p. 20; No. 58, p. 24. Only one rational conclusion is possible: the statute is concerned not with conservation, but with discrimination; not with saving the fish, but with saving the white fishermen. From 1943 to the present, this statute has had only one object—destroy the "menace" of the Japanese.

III.

Section 990 of the Fish and Game Code of California, Insofar as It Prohibits Licensing of Persons Ineligible for Citizenship, Is Invalid Because of Conflict With Federal Authority Over, and Federal Policy With Respect to, Fisheries on the High Seas and Coastal Waters.

The decision of the court below is bottomed upon the proposition that the state may regulate the taking of *ferae naturae* "owned" by it (R. 36-37). Accordingly, it is argued, California as "owner" may restrict the taking of fish in coastal waters, and may further restrict the landing of fish, of the same species found in coastal waters, taken on the high seas. In short, the California statute is sought to be sustained as the legitimate conservation of State-owned property.

Petitioner has already shown that, even on that assumed basis, the statute must fall. But Section 990 is invalid for another reason. It is in conflict with Federal authority over, and federal policy with respect to, the fisheries sought to be regulated.

For effective conservation, and indeed for any conservation at all, the fisheries favored by California-based vessels must be treated as a unit. Fish Bulletin No. 15 (1929) pp. 50, 62. They cannot be divided by an artificial line between the "high seas" and coastal waters. The State's own Department of Natural Resources has stated that the California commercial catch of fish comes in part from areas south of the Mexican border, north of the Oregon boundary, and westward as far as Japan. Fish Bulletin No. 57 (1940) p. 27; Fish Bulletin No. 58 (1940) p. 29; Fish Bulletin No. 59

(1944) p. 29.[3] One report stated, concerning the fishing grounds off the southern California coast (Fish Bulletin No. 15 (1929) p. 9):

> "Although one fishery, it is arbitrarily cut into four parts by two imaginary lines drawn on the map. The boundary between the United States and Mexico when extended westward divides the area horizontally into northern and southern portions, while the three mile limit running vertically cuts a three mile strip off the eastern edge of this fishing area. The fishermen, the fish, and the ocean currents pay little attention to these lines, and the only excuse for drawing them is in such cases as involve the levying of duty or determining state and national jurisdiction."

The long history of international disputes and conventions to regulate open-sea fishing, adverted to by this Court in *United States* v. *California*, 332 U. S. 19, 32, need not be repeated in detail at this point. More important here is the inadequacy of controlling fisheries by states on any theory of jurisdiction over coastal waters. Conservation of the Alaskan salmon fishery was found, in 1938, to depend on the uncertainties of a

[3] California Marine Fisheries officials, proud of the range of the California tuna boats that, by 1934, had made "Costa Rica, Panama and the Galapagos Islands . . . the common fishing grounds," (Fish Bulletin No. 44 (1935) p. 41; Fish Bulletin No. 49 (1937) p. 26) publicly regretted war-time restrictions on sailing tuna boats south of 10° N. Latitude. California, Department of Natural Resources, Division of Fish and Game, Report for 1940-1942, p. 49. Conservation studies of the sardine and mackerel fisheries have involved the release of California-tagged fish off the coasts of Mexico and Oregon, and cooperation with the fisheries departments of Canada, Washington and Oregon, and with the United States Fish and Wildlife Service. Id. at 37, 38; 1942-1944 Report, at 49, 50.

"gentleman's agreement" with Japan. Jessup, *The Pacific Coast Fisheries* (1939) 33 A. J. I. L. 129, 132-133. The success of the Canadian-United States halibut conservation program was likewise "threatened by the invasion of British and Norwegian fishing interests with floating refrigeration plants." *Id.* at 133. Similarly, British attempts to regulate fishing outside the three-mile limit in Moray Firth were rendered ineffective, and eventually abandoned, because of the intransigence of Norway. *Id.* at 135. And the attempt to draft a convention governing territorial waters at the international Codification Conference of 1930 failed because of inability to reconcile "territorial waters" (coastal waters) and "open sea" fishing. Daggett, *The Regulation of Maritime Fisheries by Treaty* (1934) 28 A. J. I. L. 693. Effective fishery conservation requires Federal action, either by the promotion of international convention and agreement, or by the assertion, backed by other appropriate Federal sanctions, of a preemptive right to regulate fishing in designated areas. As was stated by this Court in *United States* v. *California* (332 U. S. at 35):

> "whatever any nation does in the open sea, which detracts from its usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such and not their separate governmental units."

However, under the doctrine of *United States* v. *California, supra*, it is highly doubtful that California may constitutionally apply Section 990 of its Fish and Game Code even in coastal waters. Compare *Toomer* v. *Witsell*, October Term, 1947, No. 415. In the *California* case, this Court repudiated the doctrine of coastal State "ownership" of waters beyond the mean low-tide

marks. Accordingly, fish in the coastal waters are "owned", not by California, but by the United States as a whole. Whatever jurisdiction California may assert over the taking of fish in this domain is exercised on behalf of the people of the United States. California legislation restricting the taking of fish in coastal waters must, therefore, be framed in accordance with national policy. Although *United States* v. *California* expressly preserved the power of the coastal States to exercise reasonable police power and, in particular, to regulate and conserve fish in coastal waters in the absence of overriding federal regulations, State jurisdiction in coastal waters is exercised, not by right, but by sufferance, in trust for the nation. A fair reading of the *California* case necessitates the conclusion that State regulation of coastal waters is invalid where it conflicts with an established federal policy, whether or not comprehensive federal occupation of the field by statute is found. In the instant case, however, Federal action has been sufficiently comprehensive to satisfy even the more specific criteria of *Hines* v. *Davidowitz*, 312 U. S. 52, 68, as well as the doctrine necessarily to be drawn from the *California* case.

Federal occupation of the field begins with the Constitutional guarantees of freedom to pursue any legitimate occupation, without governmental discrimination because of race or color, as implemented by the specific language of Section 41 of Title 8, U. S. C.:

> "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security

> of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The "plain object" of this statute was to make "the rights and responsibilities, civil and criminal" of all persons, and particularly of the colored races "exactly the same" as those of white citizens. *Virginia* v. *Rives*, 100 U. S. 313, 318. Through the mechanism of first denying a license, the California statute subjects the Japanese alien who fishes for a living to punishment, pains, penalties and exactions—in the form of criminal sanctions—not imposed upon white fishermen.

Nor have the controversies which, as noted by this Court, have "arisen among nations about rights to fish in prescribed areas," (*United States* v. *California*, 332 U. S. at 32) been limited to the right to fish on the high seas. They have extended to the taking of fish within coastal waters. Brief for the United States in Support of Motion for Judgment, p. 87, *United States* v. *California*; Jessup, *supra*, at 136. The settlements of these controversies, by international negotiation and treaty, have cut across the artificial "three-mile" line, and have not imposed racial or citizenship limitations on the right of Americans to fish. The Bering Sea Fur Seal Convention (37 Stat. 1542) governs the coastal waters of Great Britain, Japan, Russia and the United States. The North Atlantic fishery settlements open coastal waters of the United States and Great Britain to one another's nationals. Daggett, *supra*, at 701; Brief for the United States, *supra*. The 1937 Halibut Treaty with Canada (50 Stat. 1351) and the Salmon Convention of 1930 (50 Stat. 1355) have provided for regulation of fishing, on the high seas and in coastal waters,

by international commissions. Such instruments as the Halibut Treaty have sought to preserve fishing rights, not solely for American citizens, but for the "citizens and inhabitants" of the United States.

In 1945 a Presidential Proclamation announced a national policy of establishing "conservation zones", under the jurisdiction of the federal government, governing waters traditionally regarded as "coastal" as well as the "high seas". No. 2668, September 28, 1945, 10 F. R. 12304. Moreover, the Proclamation indicated that when such fisheries have been developed by nationals of more than one nation, international agreement is the appropriate medium for fishery regulation.

By international agreements the United States is also committed to a policy of non-discrimination. In Article 55c of the United Nations charter, this nation agreed to foster:

> "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

By Article 56, this nation pledged itself to take "joint and separate action" to achieve that objective.

Similarly, in the Act of Chapultepec, the United States joined with other Western Hemisphere countries in undertaking to " . . . make every effort to prevent . . . all acts which may provoke discrimination among individuals because of race or religion."

Accordingly, the prohibition of fishing licenses to Japanese aliens—whether ostensibly in "territorial" waters or on the "high seas"—is at fatal variance with established United States policy concerning the right of access to the fisheries. This conclusion is underlined by our external policy applied to the Japanese people in

our present occupation of Japan. The new Constitution of Japan, adopted by the Japanese Government upon representations by General Douglas MacArthur's Headquarters undertakes to guarantee that (Ch. 3, Art. XIII):

> "All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin."

Manifestly, therefore, to permit the State of California to forbid licenses to Japanese fishermen in water within the Federal domain is a flagrant breach of our international commitments and policy, which can only serve as a source of friction and conflict between the United States and Japan, and thwart national efforts to secure international cooperation in fishery conservation.

CONCLUSION.

Wherefore, the petition for a writ of certiorari to the Supreme Court of California should be granted.

Respectfully submitted,

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